IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 101 OF 2003

Shri Narendra Voikunt Raikar,
r/o. House No. 1141, Ponsulem,
Canacona, Goa. .... Appellants

Versus

Shri Amaral Pereira,
r/o. House No. 1139,
Ponsulem, Canacona, Goa. .... Respondent

Mr. Sudin M.S. Usgaonkar, Advocate for the Appellant.

Mr. S.D. Lotlikar, Sr. Advocate with Mr. M. D'Souza, Advocates for the Respondent.

CORAM : **P.V. KAKADE, J.**

DATE : **7th DECEMBER, 2006**

ORAL JUDGMENT :

Heard learned Counsel for both the parties. Perused the record.

2. The unsuccessful defendant has preferred this appeal against the judgment and order passed by the Additional District Judge, Margao dismissing his appeal and confirming the judgment and order passed by the Civil Court dated 30/09/1997 decreeing the plaintiff's suit for declaration

and perpetual injunction as a consequential relief. Further, it was also directed by the trial Court that the Collector, on the basis of order passed by the Court, should make necessary changes in the Survey Record.

3. The plaintiff came with the case that the suit mill with an area of 134 sq. metres was taken over for consideration by one Smt. Maria Francisca Fernandes, his grandmother, in the name of one Shaba Bojru Naik Bagat from Shri Madev Kane, somewhere in the year 1933. After the death of said Maria Fernandes, the same was transferred in the name of her elder daughter, Dumetilda Fernandes in the year 1970, then in the name of her husband Raymond Carneiro and in the year 1973, it was transferred in the name of the plaintiff who started running the mill. The plaintiff's case was that the said mill was registered in his name, the licence of the mill was in his name, the house tax in respect of the said mill having house no. 1140 was also paid by him. According to the plaintiff, he was in possession of the said mill since the year 1973 without any objection from the defendant or from any other person and he was running the mill as his own and he acquired the right of ownership adversely against the defendant or any other person who claims a right to the said mill in the area of 134 sq. metres. He further alleged that the defendant had no right, title and

interest in the said mill. The plaintiff was openly paying all the taxes and behaved and proved that he was enjoying the said mill in the area of 134 sq. metres as the true owner of the same. He also sought to make out the case that he wanted to carry out the construction and repairs of the mill but the defendant obstructed him and as such the cause of action arose for filing the suit for declaration as well as for permanent injunction against the defendant.

4. The suit was resisted by the defendant, inter alia, denying all the allegations made by the plaintiff with specific denial that the plaintiff had perfected his title to the mill and land thereunder. According to the defendant, the documents obtained by the plaintiff were manipulated and that he was the owner of the impugned property. Further, it was the case of the defendant that since the year 1970, the mill was not operating. The said mill existed in survey no. 54/6 and the mill and the said property belonged to the defendant and his brothers and cousin brothers. According to the defendant, survey no. 54/6 where the mill existed and survey no. 54/8 where his house existed, is a part of the property known as Fatrabaga in the Village Nagorcem, described in the Land Registration Office at Quepem under no. 3308. According to him, the said property belonged to

himself and his co-sharers. The defendant has contended that said Shaba Bojru Naik Bogat was given structure to run the mill for making flour and husking paddy, prior to independence of India, by his ancestors on payment of the compensation. The said mill was operated by said Shaba Bajro Naik Bogat till 1970 after which it was not at all operated. The house in which the mill was operating belonged to the defendant and his co-sharers and as such the plaintiff had no right, title, interest in the suit property and, therefore, the suit was sought to be dismissed with costs.

5. The trial Judge, after hearing both the parties and on the basis of available evidence, came to the conclusion that the plaintiff had proved that he was in lawful possession of the mill property and has become owner thereof by adverse title and as such he was held to be entitled to reliefs claimed in the plaint and suit came to be decreed. The appeal was carried to the District Court. The lower appellate Court Judge after hearing both the sides, concurred with the findings recorded by the trial Judge and dismissed the appeal.

Hence, the present appeal.

6. At the outset, it may be noted that the learned Counsel for the appellant sought to raise two substantial questions of law when appeal came to be admitted. The first question was to the effect that whether the party could claim adverse possession against the other party, without admitting the other party to be the actual owner of the property. Second question was of technical nature arising due to the particular direction issued by the trial Judge to the Collector to amend the Survey Record and, therefore, question was raised to the effect that whether direction could be given to the Survey Officer by a decree in a suit in view of express bar under Section 106 of the Land Revenue Code?

7. At this juncture itself, it must be noted that the consequential direction issued by the trial Judge to the Collector is uncalled for and unwarranted by virtue of Section 106 of the Land Revenue Code and to that extent I have no hesitation to accept the arguments advanced on behalf of the appellant. Needless to mention that nothing turns on this aspect, especially when the successful party would be entitled to move the Collector independently to make necessary amendments in the Survey Records.

8. Turning to the earlier question which is to the effect that whether party could claim adverse possession against the other party, without admitting the other party to be the actual owner of the property. I was taken through the pleadings as well as law applicable to the plea of adverse possession. It would be worthwhile to note that initially pleadings in that regard which are sought to be assailed on behalf of the appellant in para 3 of the plaint are that the plaintiff has come with the case that the original owner of the said mill was Smt. Maria Francisca Fernandes who is the grandmother of the plaintiff and the mill was owned and possessed as well as run by the grandmother of the plaintiff and after her death it was run by her heirs and since 1973, the plaintiff took over the administration of the said mill and started running the same. Ever since then, the plaintiff was in possession of the said mill without any interruption from the defendant or from any other party. It is the case sought to be made out by the plaintiff further that right from the beginning from the time of his grandmother and since he began to administer and running the mill, nobody including the defendant interrupted or caused any obstruction to his activities and continued to run and enjoyed the flour mill as his own or as its rightful owner of the said mill and as such the plaintiff submits that he has acquired right of ownership and enjoyment and possession of the said

mill by adverse possession against the defendant or any other person who claims or happens to claim the right, title, interest in the said mill, and to the extent of mill area under it, to the extent of 134 sq. metres. The plaintiff further alleged that the defendant intentionally and by playing some tricks and misguiding the authorities without producing title documents before the authority obtained and got his name registered in the index of land in respect of right of ownership over the said mill existing on the area of 134 sq. metres.

9. On this background, both the Courts below come to the conclusion that the plaintiff has proved that he had acquired title by adverse possession in respect of the mill. It is apparent from the record that the plaintiff had pleaded that since the year 1973 he was in possession of the mill and running the same without any objection from the defendant. Therefore, on this pleading it was found that alleged ownership of the defendant was successfully challenged by the plaintiff that invoked the doctrine of ownership by adverse possession. Mr. Usgaonkar, the learned Counsel for the appellant brought to my notice, legal position in this regard. In my considered view, it is well settled law that before a party can succeed in establishing title on the basis of adverse possession, a plea to that

effect must be specifically raised. It is a cardinal principle that a person who claims adverse possession must plead to that effect and must show on what date he came into possession, what was the nature of his possession, whether the fact of his adverse possession was known to the owner and what was the period of such adverse possession.

10. In my considered view, all these requirements are fulfilled by the plaintiff in this case. It was submitted on behalf of the appellant that the plaint itself is defective, in the sense that when the plaintiff came with the case that he was rightful owner of the impugned property since the time of his grandmother and that he never claimed that defendant was not the true owner of the property, no adverse possession could be raised and established in this regard. It must be noted that even though the plaintiff's grandmother was running the mill and from her it finally came to the plaintiff, still the fact remains that in the year 1969, there were some legal proceeding taken by the grandmother alleging against the defendant that he was disturbing her possession in the suit property and, therefore, it cannot lie in the mouth of the plaintiff that no plea of adverse possession could be raised by this suit. No doubt that the plaint may not be happily drafted, however, only for that reason party cannot be deprived of its lawful rights.

Therefore, I have no doubt whatsoever that the question of law sought to be raised in this Second Appeal is devoid of any merits and, therefore it cannot be considered to be arising in the present matter.

11. Be as it may, the fact remains that there are concurrent findings recorded by both the Courts below and it is settled law that concurrent findings recorded by the Court, howsoever erroneous cannot be disturbed by the High Court in its jurisdiction under Section 100 of the Civil Procedure Code unless those are found to be based on perverse findings or on inadmissible evidence on record, which is the case in the present matter and, therefore, I hold that appeal is devoid of any merits and, hence deserves to be discarded. However, as the direction given by the trial Court to the Collector is uncalled for, the appeal is held to be partly allowed to the extent that the direction given to the Collector in the trial Court's order is hereby set aside and remaining decree is confirmed. With this direction, the appeal stands disposed of with no order as to costs.

P.V. KAKADE, J.

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